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No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY AND EIGHT OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. PETITIONER LACKS STANDING BECAUSE SHE HAS SUFFERED NO INJURY AND THE ISSUE BEFORE THE COURT IS MOOT	4
A. Petitioner Did Not Suffer an Injury	5
1. *Petitioner Has Failed to Show a Concrete, Particularized Harm Stemming from UT-Austin's Decision to Deny Her Admission*	5
2. *Petitioner Cannot Pursue a Claim on Behalf of Other Similarly-Situated Individuals*	6
3. *Petitioner Has Not Suffered a Constitutional Harm*	7
B. The Issue Is Moot	8
II. THE COURT SHOULD ANALYZE BENIGN AND INVIDIOUS CLASSIFICATIONS DIFFERENTLY CONSISTENT WITH ITS PAST PRACTICE AND THE PURPOSE OF THE EQUAL PROTECTION CLAUSE	10

TABLE OF CONTENTS—Continued

Page

A. The History of the Fourteenth Amendment Supports a Distinction Between Benign and Invidious Use of Race 10

1. *The Fourteenth Amendment Was Intended to Eliminate Discrimination Against African Americans* 10

2. *Use of the Equal Protection Clause to Target Invidious Discrimination* . 11

B. The Court Can Appropriately Analyze Benign Classifications Differently from Invidious Classifications Using a Spectrum Approach 14

1. *Benign Classifications Are Distinguishable from Invidious Ones* 14

a. Historically, the Supreme Court Distinguished Benign and Invidious Classifications 14

b. Legitimate Concerns Arise When Applying Strict Scrutiny to Benign Race-Based Programs 17

2. *Courts Can Maintain Consistency While Analyzing the Purpose and Motives of Benign Classifications Using an Intermediate Level of Scrutiny* 19

a. Applying a Spectrum Test Allows for Consistency 20

TABLE OF CONTENTS—Continued

Page

b. Consistency across Benign Race and Gender Programs Is Desirable 21

C. The Court Has Modified the Expressed Level of Scrutiny Based on Its Valuation of the State's Interest Consistent with the Spectrum Approach 22

D. Properly Valuing the State's Interest Better Explains the Court's Decisions in Equal Protection Cases 26

III. THE HOLISTIC CONSIDERATION OF RACE, WHICH ONLY PARTIALLY MODERATES THE ADVERSE IMPACT OF TEST SCORES ON MINORITIES, IS NOT AN IMPERMISSIBLE "RACIAL PREFERENCE." 30

A. College Admission Tests Have Serious Adverse Impact on Minority Applicants 31

B. Holistic Consideration of Race Is Essential to Mitigate the Racial Bias of Facially Neutral Admission Test Criteria 32

C. Removal of Race from the Admissions Process Will Not Result in Racial Neutrality 39

CONCLUSION 40

TABLE OF AUTHORITIES

CASES — Page(s)

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ..... *passim*

Arena v. Graybar Elec. Co., Inc., 669 F.3d 214 (5th Cir. 2012) 4

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Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954) 16

Burns v. State, 48 Ala. 195 (1872) 11

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City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 24, 25, 28

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539 U.S. 244 (2003) 17, 18

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401 U.S. 424 (1971) 32

Grupo Dataflux v. Atlas Global Grp., L.P.,
541 U.S. 567 (2004) 4

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539 U.S. 306 (2003) .....*passim*

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872 F.2d 1521 (11th Cir. 1989) 32

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543 U.S. 499 (2005) 17, 18

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388 U.S. 1, 10 (1967) 14

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 5

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497 U.S. 547 (1990) 14

Neal v. Delaware,
103 U.S. 370 (1881) 12

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 16, 32

Renne v. Geary,
501 U.S. 312 (1991) 8

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517 U.S. 620 (1996) 25, 26

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321 U.S. 1 (1944) 19

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U.S. 303 (1880) 11, 12

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528 U.S. 18 (1999) 8

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310 U.S. 141 (1940) 19

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430 U.S. 144 (1977) 15

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Inc., 454 U.S. 464 (1982) 5

Vill. of Arlington Heights v. Metrop. Hous. Dev. Corp.,
429 U.S. 252 (1977) 15, 16

Warth v. Seldin,
422 U.S. 490 (1975) 6, 7

Washington v. Davis,
426 U.S. 229 (1976) 15, 16

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118 U.S. 356 (1886) 15

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U.S. Const. art. III 5, 6

TABLE OF AUTHORITIES—Continued

Page(s)

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Access, Equity and Diversity ("AAAED"), California Hispanic Chambers of Commerce ("CHCC"), Feeding and Teaching Organization of Los Angeles ("Feeding and Teaching"), Fund for Leadership, Equity, Access and Diversity ("LEAD Fund"), California Leadership Institute ("CLI"), National Association for Diversity Officers in Higher Education ("NADOHE"), National Organization for Women Foundation ("NOW Foundation"), TODOS UNIDOS, Inc., and Transgender Legal Defense & Education Fund ("TLDEF") respectfully submit this brief amici curiae in support of the Respondent University of Texas at Austin ("UT-Austin").[1]

AAAED, founded in 1974 as the American Association for Affirmative Action, is a national non-profit organization of approximately 1,000 practicing professionals and institutions. Nearly one-half of AAAED members, who manage affirmative action, equal opportunity, diversity, and other human resources programs, work for colleges and universities.

CHCC, representing the interests of over 700,000 Hispanic owned businesses in California, recognizes the importance of affirmative action in academic admissions to the diverse business and education communities, and its impact on procurement, which is so essential to economic growth.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this amici brief have been filed with the Court.

Feeding and Teaching is dedicated to alleviating hunger and providing skills to the needy, developing programs to increase awareness of the hunger problem, and providing an opportunity for volunteerism and community involvement.

The LEAD Fund was established as a 501(c)(3) charitable organization to provide thought leadership in promoting inclusive organizations and institutions through research and education on issues related to diversity, social responsibility, human, and civil rights.

CLI is a non-partisan and non-profit organization dedicated to educating current and future leaders and building a catalyst for change.

NADOHE serves as the preeminent voice for diversity officers in higher education, producing and disseminating empirical evidence to support diversity initiatives, identifying and circulating exemplary practices, providing professional development for current and aspiring diversity officers, informing and influencing national and local policies, and creating and fostering networking opportunities.

NOW Foundation, a 501(c)(3) organization devoted to furthering women's rights through litigation and education, has as a primary objective assuring access to all aspects of education for women and girls, including equal access for women and girls of color.

TODOS UNIDOS is a 501(c)(3) nonprofit corporation founded in 2004 providing programs and services in the areas of education, health, social, cultural and economic development, and serves thousands of Latinos and others in California.

TLDEF is a nonprofit law firm committed to ending discrimination in employment, education, and access to health care based upon gender identity and expression, and to achieving equality for transgender people through public education, test-case litigation, direct legal services, and public policy efforts.

Given their missions and membership composition, Amici are uniquely suited to opine on the importance of both (1) the need for diversity on campus to ensure that students receive the best possible education and graduate with the skills and experiences necessary to succeed as citizens, workers, and leaders, and (2) the need for diversity on campus to employers who, to remain competitive, must hire qualified workers reflecting the increasingly diverse communities and markets in which their businesses operate.

SUMMARY OF ARGUMENT

Following remand by this Court, the Fifth Circuit concluded UT-Austin's limited consideration of race in admissions to further holistic diversity satisfied a strict scrutiny inquiry. Unhappy with that decision, Petitioner again seeks to bar consideration of race by UT-Austin (or any other institution of higher education) asserting that, in essence, the use of race can never satisfy strict scrutiny. Petitioner asks the Court to endorse a standard of review strict in theory, but fatal in fact.

Amici support the Fifth Circuit decision and submit this brief to further elaborate on three issues. First, Petitioner lacks standing because she can make no showing of an injury and the issue at the heart of her case is moot. Second, even if Petitioner has standing, the Court should rule in favor of Respondent because (1) UT-Austin's admissions program satisfies the

requirements historically associated with the level of scrutiny applied by the Court to benign classifications, and (2) since holistic consideration of race only partially moderates the adverse impact of test scores, it does not constitute an impermissible "racial preference."

ARGUMENT

I. PETITIONER LACKS STANDING BECAUSE SHE HAS SUFFERED NO INJURY AND THE ISSUE BEFORE THE COURT IS MOOT.

Jurisdiction must exist at every stage of litigation. A party "may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 576 (2004) (citations omitted). The fact that "defendant[] failed to challenge jurisdiction at a prior stage of the litigation, . . ." does not preclude it from raising it later. *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223 (5th Cir. 2012). The "independent establishment of subject-matter jurisdiction is so important that [even] a party ostensibly invoking federal jurisdiction may later challenge it as a means of avoiding adverse results on the merits." *Id.* (quoting 13 Charles Alan Wright, et al., *Fed. Practice & Procedure* § 3522 at 122–23 (3d ed. 2008)).

A. Petitioner Did Not Suffer an Injury.

1. Petitioner Has Failed to Show a Concrete, Particularized Harm Stemming from UT-Austin's Decision to Deny Her Admission.

To have Article III standing, Petitioner must have suffered (1) a concrete, particularized "injury in fact" (2) that bears a causal connection to the alleged misconduct, and (3) that a favorable court decision is likely to redress. *Valley Forge Christian Coll. v. Americans United For Separation of Church & State*, Inc., 454 U.S. 464, 471 (1982) (citations omitted). The "injury in fact" – an invasion of a legally-protected interest must be (1) concrete and particularized (injury must affect the plaintiff in a personal and individual way); and (2) "'actual or imminent', not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and footnote omitted). Further, a plaintiff must make a factual showing of perceptible harm. *Id.* at 566.

While UT-Austin denied Petitioner admission to its undergraduate program,[2] Petitioner has not provided evidence of a causal connection to the holistic review employed by UT-Austin and her rejection. In fact, absent consideration of race, Petitioner would not have been admitted to UT-Austin:

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[2] Petitioner may claim other possible harms resulting from Respondent's action, such as fewer or less prestigious employment or economic opportunities, but those speculative claims suffer from the same shortcoming as her principal claim of harm—denial of admission to UT-Austin. No causal connection exists between Petitioner's rejection and UT-Austin's race-conscious admission program.

> Fisher's AI scores were too low for admission to her preferred academic programs at UT Austin; Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1. And, because nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students, all holistic review applicants "were only eligible for Summer Freshman Class or [Coordinated Admissions Program] admission, unless their AI exceeded 3.5." Accordingly, even if she had received a perfect PAI score of 6, she could not have received an offer of admission to the Fall 2008 freshman class. If she had been a minority the result would have been the same.

Fisher v. Univ. of Texas, 758 F.3d 633, 638-39 (5th Cir. 2014). Because UT-Austin rejected Petitioner's application based on her academic record, Petitioner cannot establish any causal link between that decision and UT-Austin's race-conscious admissions program.

2. *Petitioner Cannot Pursue a Claim on Behalf of Other Similarly-Situated Individuals.*

Article III judicial power exists "only to redress or otherwise protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). To claim an "injury," plaintiff must have suffered "some threatened or actual injury resulting from the putatively illegal action." *Id.* However, UT-Austin denied Petitioner admission because of her academic record. Assuming *arguendo* that other candidates for admission at UT-Austin suffered the type of harm claimed by Petitioner, she

may not "cloak" herself in their injury since it is not enough to allege an injury that has been suffered by other, unidentified members of the class to which she belongs and purports to represent. *Id.* at 502.

3. Petitioner Has Not Suffered a Constitutional Harm.

Petitioner has an "injury in fact" when she can establish the "inability to compete on an equal footing." *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 666 (1993). Further, it is not necessary to prove that the benefit would have flowed, absent the consideration of race, as the existence of a barrier to compete equally is the violation. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). In both cases, the Supreme Court ruled the plaintiffs were denied an opportunity to compete equally, because the imposition of the barrier, not the ultimate inability to obtain a benefit, established the "injury in fact." *Id.*; *City of Jacksonville*, 508 U.S. at 666.

Unlike those cases, UT-Austin did not consider Petitioner's race. Throughout UT-Austin's evaluation of her personal application, there was no denial of an opportunity to compete equally and, consequently, no potential for constitutional harm.

Even if Petitioner could establish that she faced a barrier in her opportunity to compete, she fails to prove a Constitutional harm because consideration of race likely would not have impacted the admissions outcome in any statistically significant way. While affirmative action programs give minority applicants a significant boost in selective admissions, it is not true most white applicants would fare better if schools eliminated the practice. Goodwin Liu, *The Myth and*

the Math of Affirmative Action, Wash. Post, Apr. 14, 2001, at B01, *available at* http://diversity.umich.edu/admissions/statements/liu.html. This occurs in any selection process in which the applicants who do not benefit from affirmative action greatly outnumber those who do. *Id.*

A study of 1989 data showed that elimination of racial preferences would have increased the likelihood of admission for white undergraduate applicants from 25 percent to only 26.5 percent. *Id.* Further, at scores of 1300 and above, the chance of admission for white applicants would have increased by one percentage point or less. *Id.* From a statistical standpoint, consideration of race in the admissions process would not have impacted Petitioner's ability to compete equally in any meaningful way. Without a barrier to overcome, the Constitutional harm is nonexistent.

B. The Issue Is Moot.

Federal courts only have constitutional authority to resolve actual disputes. A live case or controversy must exist for the court to resolve, and legal actions cannot commence or continue after the matter has been resolved, else the matter becomes "moot." *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Renne v. Geary*, 501 U.S. 312 (1991). Further, when a plaintiff seeking forward-looking relief challenges a discrete governmental decision as based on an impermissible criterion, and the facts show the government would have made the same decision regardless, there is no liability and no cognizable injury. *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

Petitioner did not bring this case on behalf of future applicants. She enrolled at Louisiana State

University and never reapplied or requested a transfer to UT-Austin. In fact, she flatly rejected an offer to attend a satellite campus, with the option of transferring. Accordingly, the Fifth Circuit denied standing for forward-looking relief, leaving the application fee of one hundred dollars as the only injury in dispute. *Fisher*, 758 F.3d at 639-50. "To the extent that Fisher's alleged injury is a monetary one . . ., it bears no causal connection to the complained-of university conduct. UT's consideration of race in admissions did not make Fisher any more likely to apply to UT and thus to pay the fees. If anything, the opposite is true." Adam Chandler, *Legal Scholarship Highlight: The Trouble with Fisher*, SCOTUSblog (Sept. 6, 2012, 5:41 PM), http://www.scotusblog.com/2012/09/legal-scholarship-highlight-the-trouble-with-fisher/. UT-Austin offered to refund this application fee, and it matters not that Petitioner refused the offer. The case was resolved the instant the offer was made.

There is no live case or controversy for the court to consider. Even assuming an actual dispute, no remedy can resolve it. The redressability of an injury is integral to the standing inquiry. *Fisher*, 758 F.3d at 640 n. 26. Thus, petitioner lacks standing on the basis of "mootness."

II. THE COURT SHOULD ANALYZE BENIGN AND INVIDIOUS CLASSIFICATIONS DIFFERENTLY CONSISTENT WITH ITS PAST PRACTICE AND THE PURPOSE OF THE EQUAL PROTECTION CLAUSE.

A. The History of the Fourteenth Amendment Supports a Distinction Between Benign and Invidious Use of Race.

1. The Fourteenth Amendment Was Intended to Eliminate Discrimination Against African Americans.

In the aftermath of the Civil War, Southern states passed "black codes" which severely restricted the civil rights of African Americans. Besides creating more stringent criminal penalties for blacks than whites, these codes limited the abilities of African Americans to hold real property, personal property, and to form and enforce contracts. *See* Brest et al., *Processes of Constitutional Decisionmaking* 301-09 (2006). Congress first attempted to respond to this discriminatory regime by enacting the Civil Rights Act of 1866, which passed over President Andrew Johnson's veto. *Id.* However, concerns about the constitutionality and the long-term security of this provision led to the drafting of the Fourteenth Amendment. *Id.* The intent was to remedy systemic racial discrimination that had taken place prior to the war and to empower the Federal government with tools to prevent the reestablishment of any system seeking to distinguish among citizens either de jure or *de facto*. *See* William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial*

Doctrine 124 (1988) (quoting Representative Samuel Shellabarger).

The framers of the amendment contemplated the Equal Protection Clause as an enforcement provision to secure the rights of citizens:

> [B]y declaring all our people United States citizens. . . declaring that the States shall not deny them equal protection of these equal laws, and then declaring that Congress shall have power . . . to enforce the enjoyment of these privileges of citizenship by seeing to it that the laws do not abridge them nor the States withhold protection to them.

Cong. Globe, 42d Cong., 1st Sess. app. 68 (1871).

With a clear Congressional mandate, the courts set about the task of dismantling the legal regime constructed by the former Confederacy to deprive African Americans of the equal rights to which they were entitled. *See, e.g., Burns v. State*, 48 Ala. 195 (1872).

2. Use of the Equal Protection Clause to Target Invidious Discrimination.

The Federal courts penned a series of decisions striking down state actions, which sought to deny to some citizens rights enjoyed by others based solely on an arbitrary construction. In *Strauder v. West Virginia*, the Supreme Court held that the categorical exclusion of African Americans from jury service was unconstitutional under of the Equal Protection Clause. *See generally* 100 U.S. 303 (1880). The majority noted the purpose of the Equal Protection Clause was "to assure to the colored race the enjoyment of all the civil rights that under the law are

enjoyed by white person, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." *Id.* at 306. *Strauder* formed the foundation for the first major series of decisions targeting discrimination aimed against African Americans. *See Bush v. Kentucky*, 107 U.S. 110 (1883); *Neal v. Delaware*, 103 U.S. 370 (1881).

While compelling on its own merits, the early judicial interpretation of the amendment is only a piece to understanding the original intent behind the Fourteenth Amendment. The legislative and social history surrounding the amendment is relevant to the standard of review and treatment of affirmative action programs today. As one commentator explains:

> From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985).

The Freedman's Bureau Acts of 1865 and 1866 are illustrative of this point. The Freedman's Bureau was established, in part, for the proper administration of race conscious social, legal, and *educational* programs designed to benefit African Americans. H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. (1865). The Bureau's role in ensuring that former slaves received a quality education was at the heart of its purpose. As General Oliver Howard, the Commissioner of the Freedman's Bureau, noted, "The most urgent want of the freedmen was a practical education; and from the first I have devoted more attention to this than to any other branch of my work." 2 Oliver O. Howard *Autobiography* 368 (1907). During its later years, the Bureau provided land and funding to help establish exclusively black educational institutions. U.S. Bureau on Refugees, *Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen*, 60-632 (July 1, 1868). Eventually, the Bureau's work in providing educational opportunities to former slaves subsumed nearly all of its other functions when the Congress indefinitely continued "the educational department of" the Bureau. Act of July 25, 1868, ch. 245, 15 Stat. 193.

B. The Court Can Appropriately Analyze Benign Classifications Differently from Invidious Classifications Using a Spectrum Approach.

1. Benign Classifications Are Distinguishable from Invidious Ones.

a. Historically, the Supreme Court Distinguished Benign and Invidious Classifications.

In *Loving v. Virginia*, the Supreme Court declared "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of *invidious* racial discrimination in the States." 388 U.S. 1, 10 (1967) (emphasis added). Accordingly, in *Metro Broadcasting, Inc. v. FCC*, a majority of the Court held intermediate scrutiny applied to benign race-based measures. 497 U.S. 547, 563 (1990); *see also Fullilove v. Klutznick*, 488 U.S. 448, 473 (1980) (applying intermediate scrutiny to a minority set-aside program in plurality decision). These decisions established that "benign" racial classifications, in at least some circumstances, were subject to intermediate review. *Metro Broad., Inc.*, 497 U.S. at 563.

Despite this precedent, the Court later held that strict scrutiny applies to all racial classifications. The Court rationalized this departure by stating that "[a]bsent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Following

Croson, the majority in *Adarand* continued to upend the Court's earlier position, and adopted strict scrutiny for programs enacted by the federal government. *Adarand Constructors, Inc.*, 515 U.S. at 219.

Prior to these cases, courts found no difficulty in distinguishing between "benign" and "invidious" programs. For example, a classification made simply to oppress African Americans or other minorities would have no conceivable justification sufficiently compelling to withstand judicial review. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). Similarly, the validity of classifications that segregate individuals based on race requires skepticism.

When considering facially neutral policies to show an unconstitutional racial classification, a party must first prove a "racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Vill. of Arlington Heights v. Metrop. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977). In *Davis*, the Court upheld a facially neutral law that had a racially disproportionate impact on minorities, citing "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S. at 241. The use of race "in a purposeful manner" does not suffice unless a "racial slur or stigma" is intended or inferred, or the classification can be shown independently to have been intended to violate a constitutional right. *United Jewish Organizations of Williamsburgh, Inc., v. Carey*, 430 U.S. 144, 163 (1977). The Court has enumerated several factors to establish invidious intent for facially neutral laws, including legislative history, sequence of events, patterns of behavior, and departures from

normal decision-making procedures, as evidentiary sources to divine invidious intent. *Arlington Heights*, 429 U.S. at 266-68. Those same factors could be used to distinguish benign from invidious intent where it is not obvious.

Benign classifications are distinguishable from invidious ones in measurable ways that justify applying a different standard of review. In the affirmative action context, a benign classification via a race-based program does not produce the same type of harm as an invidious classification. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 375 (1978) (Brennan, J., concurring in part and dissenting in part) ("[T]here is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them. . . . The use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color."). With a benign program, minority and non-minority students benefit alike. Minority students receive an increased chance of success through quality education and all students receive the benefits of diversity. Moreover, a societal benefit ensues when educational institutions produce a diverse set of leaders with legitimacy in the eyes of the citizenry.

The blanket application of strict scrutiny to all racial classifications has come under question precisely because it is not sustainable as a standard for reviewing the legitimacy of benign governmental

actions based on race. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 516 (2005) (Ginsburg, J., joined by Souter and Breyer, JJ., concurring); *id.* at 524 (Thomas, J., joined by Scalia, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 298-302 (2003) (Ginsburg, J., joined by Souter and Breyer, JJ., dissenting); *Adarand Constructors, Inc.*, 515 U.S. at 243-49 (Stevens, J., joined by Ginsburg, J., dissenting). This Court should revisit the standard of review in cases like this one, where universities seek to ensure diversity in their student bodies through benign race-based affirmative action programs.

b. Legitimate Concerns Arise When Applying Strict Scrutiny to Benign Race-Based Programs.

This Court has expressed concerns about applying strict scrutiny to review benign race-based programs. For example, in *Adarand*, Justice Stevens expressed his concerns with applying the label "strict scrutiny" to benign race-based programs:

> [Strict scrutiny] has usually been understood to spell the death of any governmental action to which a court may apply it. The court suggests today that strict scrutiny means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of 'strict scrutiny' will skew the analysis and place well-crafted benign programs at unnecessary risk.

515 U.S. at 243-44 n.1 (Stevens, J., dissenting). Justice Stevens emphasized the difference between

invidious discrimination, aptly labeled an "engine of oppression," and "benign" legislation, which has an entirely different purpose—a "desire to foster equality." *Id.* at 243. Further, Justice Stevens advocated for applying strict scrutiny to invidious classifications and intermediate scrutiny to benign classifications. *Id.*

In *Gratz*, Justice Ginsburg criticized the Court's application of the same standard of review for all official race classifications. 539 U.S. at 298 (Ginsburg, J., dissenting). Justice Ginsburg stated that:

> government decisionmakers may properly distinguish between policies of exclusion and inclusion. . . . Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.

Id. at 301 (citations omitted); *see also Johnson v. California*, 543 U.S. at 516 (Ginsburg, J., concurring). Strict scrutiny may have been necessary at the time to "smoke out" the invidious classification masquerading as benign. *See Croson*, 488 U.S. at 493. Today, however, universities seeking to increase campus diversity have done so to provide a richer classroom experience and the educational benefits that result from a diverse student body. They have not done so in order to hide an invidious intent behind a benign façade.

In *Adarand*, this Court stated that strict scrutiny takes "relevant differences" into account "to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." 515 U.S. at 228.

Importantly, *Adarand* recognizes that not all racial classifications are the same. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," *Tigner v. Texas*, 310 U.S. 141, 147 (1940), and "not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Because of this proposition, this Court has applied varying levels of judicial scrutiny to different classifications of groups under the Equal Protection Clause, based on the type of classification being made. Programs like UT-Austin's, designed to promote inclusion and remedy the historical disadvantages of race discrimination, are deserving of a different standard of review along the equal protection spectrum. Properly contextualized, the Equal Protection analysis should consider benign classifications differently.

2. *Courts Can Maintain Consistency While Analyzing the Purpose and Motives of Benign Classifications Using an Intermediate Level of Scrutiny.*

Any concern that subjecting benign classifications to a more flexible standard of review will mean all affirmative action programs are *per se* constitutional is unfounded. The difference in standard simply alters the first analytical step—determining how closely to scrutinize the program at issue.[3] Because not all

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[3] Amici do not argue for the cessation of a searching inquiry when race is a component of a decision. Rather, the Court should conduct that inquiry but balance it against the State's interest to determine whether the classification is benign or otherwise.

classifications are equally objectionable under the Equal Protection Clause, the Court should consider the classification under review make a determination whether the classification is benign or invidious. Reviewing benign classifications under a more relaxed standard does not alter the need, or the opportunity, for the Court to conduct a searching inquiry. Rather this process follows precisely what the Court prescribed in *Adarand*—considering relevant differences and distinguishing a legitimate use of race from an illegitimate one in making a determination.

a. Applying a Spectrum Test Allows for Consistency.

Depending on the classification at issue, i.e. race, sex, etc., the Court applies a variation on the stated standard. Instead of forcing classifications into rigid tiers, or diluting the standard of strict scrutiny, a flexible and intermediate standard of review for benign classifications presents a more realistic and practicable approach.

By employing a more flexible spectrum for review of equal protection challenges, the Court will create greater consistency in its decisions. The Court's current process "assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority." *Adarand Constructors, Inc.*, 515 S. Ct. at 212 (Stevens, J., dissenting); *see also* Brian C. Eades, Note, *Affirmative Action: The United States Supreme Court Goes Color-Blind*: Adarand Constructors, Inc. v. Pena, 29 Creighton L. Rev. 771, 784 (1996). Benign

classifications hold a different purpose from invidious classifications seeking on their face to burden a minority racial group. Consistency does not necessitate analyzing all race-based classifications under the same standard. Instead, the Court can continue to conduct a thorough inquiry and then raise or lower its deference appropriately, addressing benign racial classifications under one standard and reviewing invidious ones under a more rigid standard of review.

b. Consistency across Benign Race and Gender Programs Is Desirable.

Intermediate scrutiny represents a more logical choice of review for affirmative action programs based on race.[4] Like gender classifications, benign racial classifications are used in the affirmative action context for a legitimate purpose, and reflect no intentional malice or prejudice. Numerous scholars have pointed out the inconsistency in standard of review for benign affirmative action programs based on gender versus race:

> [A]s the law currently stands, the Court will apply 'intermediate scrutiny' to cases of invidious gender discrimination and 'strict scrutiny' to cases of invidious race discrimination, while applying the same standard for benign classifications as invidious ones. If this remains the law, . . . the government can more easily enact affirmative action programs to remedy discrimination

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[4] Amici do not argue the level of scrutiny for affirmative action programs aimed at other classes, such as gender, sexual identity, or disability should be raised but instead racial considerations should track other classes.

> against women than it can enact affirmative action programs to remedy discrimination against African-Americans—even thoug Amici do not argue the level of scrutiny for affirmative action programs aimed at other classes, such as gender, sexual identity, or disability should be raised but instead racial considerations should track other classes. h the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.

E.g., Frank S. Ravitch, *Creating Chaos In The Name Of Consistency: Affirmative Action And The Odd Legacy Of* Adarand Constructors, Inc. v. Pena, 101 Dick. L. Rev. 281, 296 (1997) (citation omitted). *Adarand* and *Croson* do not present viable legal standards when measured against the practical realities of their holdings. Under the current state of the law, it is harder to remedy race than sex discrimination through affirmative action, even though the Fourteenth Amendment was intended to benefit African Americans.

C. The Court Has Modified the Expressed Level of Scrutiny Based on Its Valuation of the State's Interest Consistent with the Spectrum Approach.

The Court's reliance on the three-tiered scrutiny classification system is not reflected in the outcomes of many of its most contested cases. The standard has become "strict in theory but fatal in fact" such that no use of race has been found satisfying these requirement, with the exception of *Grutter v. Bollinger*. 539 U.S. 306 (2003). The Court ostensibly

applied strict scrutiny in that case, but the level of review actually applied allowed for more deference to state interests than otherwise dictated by the classification. This relaxed standard of review employed in *Grutter* is not surprising given the fact that legitimate state and societal interests allow for the consideration of race, but the rhetoric of such a searching judicial inquiry rarely will find a situation in which that standard is met.

Practical considerations have required the Court to lessen (or heighten) the analysis dictated by the tiered system in cases involving sex-based classifications, sexual orientation, mental disabilities, and certain fundamental or quasi-fundamental rights, based on the nature of the state's interest. This practical restructuring of the system in which courts first identify a classification and then apply a corresponding level of judicial scrutiny is the natural consequence when the subtle factors underlying legitimate, yet competing, interests collide in matters of public policy.

For example, in *Grutter*, the Court clarified that remedying past discrimination is not the only permissible justification for race-based governmental action. 539 U.S. at 328. Recognizing that attaining a diverse student body is a compelling interest, the Court applied a type of strict scrutiny that took "into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* Weighing on the Court's decision was the State's interest in the way diversity "prepar[es] students for work and citizenship" and cultivates "a set of leaders with legitimacy in the eyes of the citizenry." *Id.* at 331-32.

Not everyone agreed that this level of review was consistent with the Court's jurisprudence. Chief Justice Rehnquist noted that "[a]lthough the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference." *Id.* at 380 (Rehnquist, C.J., dissenting). Justice Kennedy wrote the "Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal." *Id.* at 388 (Kennedy, J., dissenting). Assuming the Court must apply a formulaic and regimented analysis under strict scrutiny, these criticisms are not without merit. However, the Court's review of laws has always been fluid. The outcome in *Grutter* corresponds with the Court's practice of weighing the nature of the state's interest in determining the level of review to apply.

This adjustment of the level of scrutiny does not move in only one direction. The Court has raised the level of scrutiny when it finds a questionable interest asserted by the state. In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court purported to use a rational basis inquiry in striking down a zoning ordinance that denied a special use permit for a group home for individuals with mental disabilities. The Court took pains to affirm that it was not applying a heightened level of scrutiny to this analysis based on a mental disabilities classification. *Id.* at 442-46. The Court then engaged in a searching inquiry into the purpose and rationale in passing such an ordinance. *Id.* at 446-51; *see also id.* at 458 ("Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny." (Marshall, J., concurring)). In doing so, the Court ignored the City's purported interest in maintaining property values,

which would be the level of review traditionally "accorded economic and social legislation." *Id.* at 442.

Instead, the Court balanced Cleburne's purported interests against the rights of the mentally disabled and invalidated the ordinance. Under rational basis review, a court should not undertake any such balancing. The question presented is merely, "Is the purported rationale reasonable?" In *Cleburne*, it was reasonable but for the fact the ordinance appeared to target a particular class of individuals because of an inherent characteristic. *Id.* at 456 (Marshall, J., concurring). The Court adjusted its scrutiny based on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *Id.* at 460 (internal quotations omitted).

A similar increase in the scrutiny level occurred in *Romer v. Evans*, 517 U.S. 620 (1996). Until this decision, no court had recognized sexual orientation as a protected class and the Colorado Constitutional Amendment at the heart of *Romer* prohibited government action to protect individuals on the basis of sexual orientation. *Id.* at 624. The State's principal argument was not that it discriminated against homosexuals, but that it placed them in the same position as other non-protected groups. *Id.* at 626. The Court noted that the disadvantage imposed upon individuals based on their sexual orientation was "born of animosity toward the class of person affected." *Id.* at 634. While true, such an inquiry is not consistent with the purported rational basis standard of review.

D. Properly Valuing the State's Interest Better Explains the Court's Decisions in Equal Protection Cases.

Determinations of the constitutionality of any government action inherently involve value judgments. The State's interest could be exceedingly positive as it relates to educational diversity, *see Grutter*, 539 U.S. at 306, or it can be exceedingly negative as it relates to laws that penalize individuals because of their sexual orientation. *See Romer*, 517 U.S. at 620. That interest lies upon a spectrum that requires balancing many factors before the Court can pass on the constitutionality of the law. *See An Open Discussion With Justice Ruth Bader Ginsburg*, 36 Conn. L. Rev. 1033, 1045-1046 (2004) ("The decision generally turns on the character of the right involved, the individual interest at stake, and the strength of the government interest tugging the other way. I would not assign heavy weight to the labels. I don't think the Court routinely uses them in reaching its decision. The decisions are often reached without resorting to preconceived labels, and then fitted into the tiers.").

One way to conceptualize how the Court determines the level of scrutiny is to reduce the analysis to an equation:

Level of Scrutiny ("LS") = Basis of Classification ("BC")[5]

For purposes of the formula, rational basis review equals 0, intermediate scrutiny equals 1, and strict scrutiny equals 2. If the level of scrutiny was tied

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[5] A similar equation could exist for Fundamental Rights: LS = FR.

solely to the protected status of the basis of classification, i.e. race = 2, sex = 1, everything else = 0, only three possible outcomes ensue. As the cases demonstrate, however, the level of scrutiny does not mirror this simple classification. In practice, the Court has considered the value of competing interests and applied a varying level of scrutiny relative to the weight assigned to the competing values. In effect, this has created a spectrum.

In cases involving a "suspect" class where the Court values the state interest highly, the deference afforded rises. In cases involving potential animus toward a group that warrants rational basis review, the Court engages in a more searching inquiry. A more accurate equation recognizes the value of the relative government interest:

LS = BC – Government Interest ("GI")

When the government interest is strong and positive, it exerts a downward pull on the level of scrutiny that has been, and should be, applied by the Court. *Grutter* is illustrative. In theory, assuming BC is 2 because of the use of race, the level of scrutiny should also be 2 for strict scrutiny:

2 = 2

However, the level of scrutiny was not strict. Instead, the Court factored in the strength of the government interest. If we assigned a value to that interest of 0.5,[6] the formula becomes:

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[6] While assignment of the 0.5 value in this case is simply an approximation for illustrative purposes, the relevant consideration is that the Court assigned the state interest a positive value.

$$1.5 = 2 - 0.5$$

This formula more accurately reflects the level of scrutiny the Court used in upholding the Michigan Law School program; a level of inquiry somewhere between intermediate and strict scrutiny.

Conversely, when the State's purported interest is negative, it raises the level of scrutiny the Court applies. Here, *Cleburne* is illustrative. In theory, the Court used rational basis review because mental disability is not a protected class:

$$0 = 0$$

The Court actually applied a heightened form a scrutiny to strike down the ordinance. Assigning a value of -0.8[7] for the invidious intent employed by Cleburne, the formula denotes:

$$.8 = 0 - (-0.8)$$

Again, this formula more accurately reflects the heightened level of scrutiny the Court applied—something more than rational basis review.

These formulae demonstrate the inherent flaw in a tiered analysis: Defining the level of scrutiny based on one variable (race, sex, mental disability) ignores the competing interests of the state (educational diversity, disapproval of lifestyle choices, property values) that are necessary considerations for any reasoned decision.

The irony in this rigid-tier approach is that the Court has encouraged and evaluated the nature of the government interest in myriad cases involving suspect classifications and fundamental rights, but prohibits

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[7] The precise amount of the value is immaterial as long as the formula approximates a skeptical negative value to this variable.

it when weighing invidious or benign racial classifications. *Croson*, 488 U.S. at 493. In doing so, the law ignores:

> [T]he difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in 'consistency' does not justify treating differences as though they were similarities.

Adarand Constructors, Inc., 515 U.S. at 245 (Stevens, J., dissenting). To the extent the Court's refusal to distinguish invidious from benign programs in *Croson* and *Adarand* does not reflect the spectrum upon which the Court actually conducts its Equal Protection jurisprudence, the Court should overturn those cases and better provide guidance to lower courts regarding the proper weight to afford governmental interests. The Court can, and does, distinguish between invidious and benign laws and programs, and affording a more deferential review of benign racial classifications better reflects the constitutional purpose of the Equal Protection Clause.

III. THE HOLISTIC CONSIDERATION OF RACE, WHICH ONLY PARTIALLY MODERATES THE ADVERSE IMPACT OF TEST SCORES ON MINORITIES, IS NOT AN IMPERMISSIBLE "RACIAL PREFERENCE."

The question presented is whether the "use of racial preferences in undergraduate admission decisions" violates the Equal Protection Clause. Brief for Petitioner at i. To describe UT-Austin's consideration of race as a "preference," however, grossly distorts UT-Austin's use of race in its admission process.[8] Using this Court's prior guidance, UT-Austin considers race not as a "preference," but rather as a part of a "holistic" review. SJA at 4a (citing *Grutter*, 539 U.S. at 306).

Minorities face comparative systemic and institutionalized disadvantages in the process as a whole. The SAT and ACT tests, which contribute heavily to the AI used as a baseline for admissions decisions, have severe adverse impacts on minority applicants. UT-Austin's modest consideration of race

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[8] Petitioner mischaracterizes various documents to create the false impression UT-Austin awards racial "preferences" in its admissions decisions. For example, page 8 of Petitioner's brief cites pages 152a, 174a, and 280a of the Supplemental Joint Appendix ("SJA"): "In 2004, UT reintroduced racial preferences by adding "race" to the list of "special circumstances" that make up a key component of the PAI [Personal Achievement Index]." Page 152a of the SJA states that race may be considered as one of seven "special circumstances," but does not describe any "racial preference." Race is not assigned any specific weight in the PAI, but is one of many factors considered in a "holistic" review. SJA at 4a. Additionally, Petitioner's remaining page citations are not relevant. Page 174a of the SJA is from a Division of Diversity and Community Engagement report, which does not address the admissions process. Finally, page 280a does not exist.

has, at most, a small mitigating impact on the far more significant hurdles disadvantaged minorities must overcome.

A. College Admission Tests Have Serious Adverse Impact on Minority Applicants.

The large and persistent racial gap in college admission test scores is well documented and widely recognized. In 2008, when Petitioner applied for admission to UT-Austin, average SAT scores among 858,561 white college-bound seniors were 528 for Critical Reading, 537 for Mathematics, and 518 for Writing. College Board, *2008 College-Bound Seniors Total Group Profile Report* 3 (2008) (hereinafter "*2008 Group Profile*") (Table 8). The corresponding averages for black college-bound seniors were 430, 426, and 424 for Critical Reading, Mathematics, and Writing, respectively. *Id.* In statistical terms, the disparities between average white and black scores for each of these tests exceeded 370 standard deviations.[9] This dwarfs the statistical disparities noted in some of this Court's most widely noted discrimination decisions. *See, e.g., Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 165 (N.D. Cal. 2004) (47 standard deviations),

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[9] Applying a two-sample t-test using the mean and standard deviation values reported in the *2008 Group Profile*, the disparities between white and black test scores were $t = \frac{528-430}{\sqrt{\frac{102^2}{858{,}561} + \frac{97^2}{174{,}389}}} = 381.25$ standard deviations for Critical Reading, $t = \frac{537-426}{\sqrt{\frac{102^2}{858{,}561} + \frac{98^2}{174{,}389}}} = 427.46$ standard deviations for Mathematics, and $t = \frac{518-424}{\sqrt{\frac{102^2}{858{,}561} + \frac{97^2}{174{,}389}}} = 378.38$ standard deviations for Writing.

aff'd, 474 F.3d 1214 (9th Cir. 2007), *rev'd on other grounds*, 113 S. Ct. 2541 (2001) (47 SDs); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (29 standard deviations).

B. Holistic Consideration of Race Is Essential to Mitigate the Racial Bias of Facially Neutral Admission Test Criteria.

Confronted with such glaring adverse impact, an admission system based on facially neutral objective standards would place minority college applicants at a distinct disadvantage. The severity of these barriers is illustrated by the following hypothetical scenario, derived from actual statistics.

Established by this Court in *Griggs v. Duke Power Co.*, selection criteria with adverse impact on minority groups are discriminatory unless shown to have a "demonstrable relationship to successful performance." 401 U.S. 424, 431 (1971).[10] When the selection criterion is a test, the "demonstrable relationship" must be established through research that measures test "validity" by means of a "correlation coefficient." *Hamer v. City of Atlanta*, 872 F.2d 1521, 1525-26 (11th Cir. 1989). A correlation coefficient of 1.0 establishes a perfect relationship between test performance and downstream success. Conversely, a 0.0 correlation coefficient denotes the lack of any relationship at all between test scores and performance. *Id.* at 1526.

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[10] Although *Griggs* involved hiring discrimination, this principle has been extended to university admissions and testing. *See Bakke*, 438 U.S. at 308 n.44.

A report released in the same year that Petitioner applied for college admission documented a 0.35 correlation between combined scoring on all three SAT segments and the selected measure of success, which was first-year college grade point average ("GPA"). College Board, *Validity of the SAT for Predicting First-Year College Grade Point Average*, Research Report No. 2008-5, at 5 (2008) (hereinafter, *"Validity of the SAT"*) (Table 5). Because first-year GPA can be determined only for students admitted, researchers were restricted in their ability to assess correlations between SAT scores and GPA for candidates denied admission. To compensate, researchers calculated an "adjusted correlation coefficient," which was reported as 0.53. *Id.*

The practical impact of the SAT, with its adverse impact and its adjusted correlation coefficient of 0.53, is illustrated *infra*. Each of the points on this graph represents one individual among a randomly drawn sample of 200 candidates for college admission, including 100 white and 100 black applicants. The sample was drawn based on specifications that exactly mirror the broader SAT scoring and first year GPA patterns in existence at the time of Petitioner's application.[11] The diagonal line represents the

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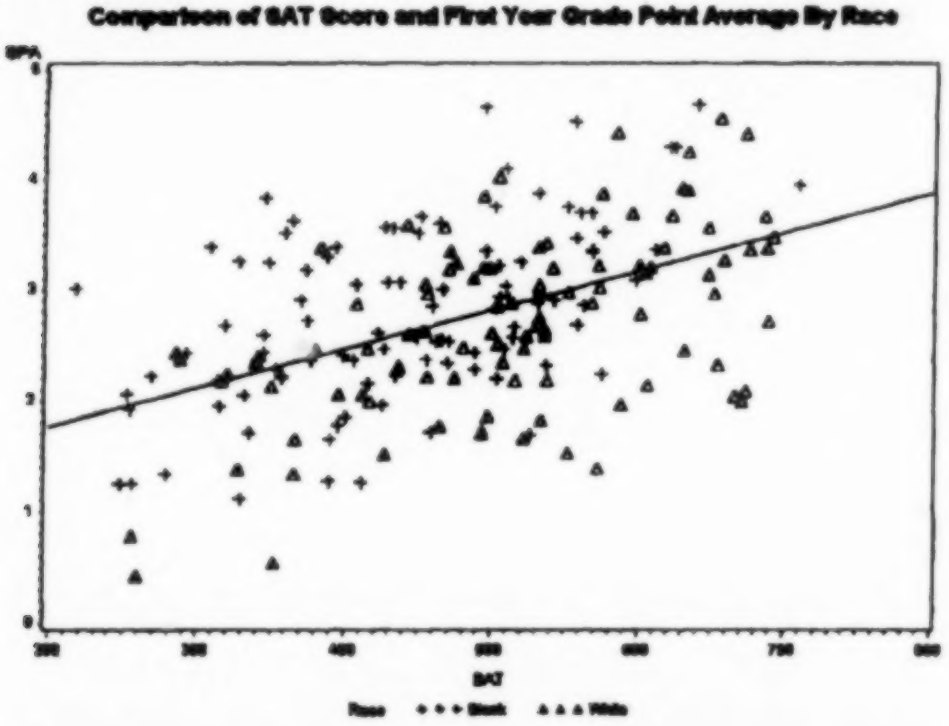
[11] SAT scores were specified to have a mean of 528 and standard deviation of 102 for the 100 hypothetical white students and a mean of 430 and standard deviation of 97 for the 100 hypothetical black students. This corresponds to the means and standard deviations on the SAT Critical Reading test for these groups reported in the *2008 Group Profile, supra*. First-year GPAs were specified to have a mean of 2.80 and standard deviation of 0.81, which corresponds to the median statistics reported in a 2012 ACT validation study based on data gathered between 2000 and 2006. ACT, *Predicting Long-Term College Success Through Degree Completion Using ACT Composite Score,*

positive 0.53 correlation between SAT score and first-year GPA.



Despite the general positive relationship between SAT score and projected GPA, students with low SAT scores often achieve high GPAs and students with high SAT scores often have low GPAs. Notwithstanding this high degree of variability, a university that relies on test scores as a selection determinant will tend to admit more white applicants than black applicants. The concentration of triangular data points, representing white applicants, on the right side of the graph, reflects this tendency. Crucially, however, not all of these elevated test scores translate into

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ACT Benchmarks, and High School Grade Point Average, at 16 (2012) (Table 3). Finally, correlations between SAT and first-year GPA, for both white and black students, were set at 0.53, consistent with the adjusted correlation coefficient in the 2008 *Validity of the SAT* report.

collegiate success as the vertical distribution of these same high-scoring triangular data points demonstrates.

If admission decisions were based solely on test scores, the imbalance between white and black admission rates would be huge. The following chart illustrates the gap in success rates for the sample at various test score cutoffs:

SAT Score Cutoff	Percentage Admitted	
	White	Black
700	0	1
650	13	1
600	26	5
550	36	17
500	57	35
450	76	50
400	85	64
350	92	78
300	96	92

Such vast gaps in acceptance rates would only be acceptable if black students, by the same large margin, were inherently less capable of academic success. They are not. *See Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting) ("[I]ncreased opportunities have produced an ever-increasing number of demonstrations that members of disadvantaged races are entirely capable not merely of competing on an equal basis, but also of excelling in the most demanding professions.").

Consistent with Justice Stevens' observation that students are equally capable of success regardless of race, a system that prefers white applicants effectively operates to disproportionately exclude more qualified black candidates. Statistics from the sample, presented in the following table, are demonstrable. At each potential scoring cutoff, the combined group of admitted students is projected to perform significantly better in college than those who were not admitted.

ff	Percentage Admitted		Average GPA (Admissions)			Average GPA (Non-Admissions)		
	White	Black	Total	White	Black	Total	White	Black
	0	1	3.95	--	3.95	2.75	2.71	2.79
	13	1	3.17	3.11	3.95	2.72	2.65	2.79
	26	5	3.35	3.20	4.12	2.64	2.54	2.73
	36	17	3.27	3.12	3.58	2.57	2.48	2.64
	57	35	3.07	2.97	3.24	2.48	2.36	2.56
	76	50	3.00	2.91	3.13	2.33	2.07	2.46
	85	64	2.92	2.86	3.01	2.26	1.86	2.42
	92	78	2.86	2.79	2.94	2.16	1.78	2.30
	96	92	2.81	2.76	2.87	1.80	1.51	1.94

The racial disparity in these decisions is obvious. Because white students tend to get higher SAT scores, but equivalent GPAs, the larger proportion of admitted white applicants will likely include individuals with lower projected GPAs. These admissions come at the expense of more qualified black applicants, who could have done as well, or even better, if afforded the opportunity.

C. Removal of Race from the Admissions Process Will Not Result in Racial Neutrality.

Petitioner argues that the "racial preference" allegedly embodied in the UT-Austin's consideration of race must be removed to achieve "the imperative of racial neutrality." Brief for Petitioner at 4 (quoting *J.A. Croson Co.*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment). In truth, however, an admission system stripped of its ability to consider race as a "special circumstance," SJA at 152a, will not be facially neutral.[12] Petitioner asks the Court to return her and other white applicants to the advantaged position they have enjoyed historically and continue to enjoy. Such an outcome does not reflect racial neutrality.

There are many potential explanations for the existing racial bias in college admission test scoring. A seminal article by research psychologist Roy O. Freedle concludes that cultural and statistical biases contribute significantly to poorer outcomes for

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[12] The sample illustration above is an oversimplification, since it focuses solely on test scores. Test scores, however, make up an important element of the UT-Austin's admissions process, and no other factor sufficiently mitigates against their disparate racial impact.

African-Americans, evidenced by scoring differences being narrower for harder questions and wider for easier items more likely to be tainted by cultural differences in reactions to verbal cues. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 Harvard Ed. Rev. 1 (2003). Psychological factors such as "stereotype threat" also lead non-Asian minorities to underperform as compared to whites and Asians with similar cognitive and academic abilities. *See, e.g.*, Scherbaum et al., *Examining the Effects of Stereotype Threat on Test-Taking Behaviors*, 14 Soc. Psychol. Ed. 361 (2011). Differences in test preparation appear to contribute further to racial disparities. *See* Ellis & Ryan, *Race and Cognitive-Ability Test Performance: The Mediating Effects of Test Preparation, Test-Taking Strategy Use and Self-Efficacy*, 33 J. Applied Soc. Psych. 2607 (2003).

Regardless of the exact causes of these wide racial differences, the most important truths for this case are that (1) they exist, and (2) they are not explained by corresponding differences in academic ability. UT-Austin's modest consideration of race, while arguably not sufficient, mitigates some of this impact. Interpreting the Equal Protection Clause to forbid such consideration ignores the fact that removal of this factor would result not in a racially neutral selection process, but rather a racially biased one.

CONCLUSION

Petitioner filed this case because she was denied admission to UT-Austin. Every year, thousands of students are denied admission to the academic institution of their choice. While certainly disappointing, Petitioner was not denied admission

because of her race, leaving no remedy for the Court to grant. Regardless, UT-Austin's careful and benign consideration of race does not violate the Fourteenth Amendment. Supreme Court precedent supports using a standard of review that is not strict in theory and fatal in fact. UT Austin's admission process, as reviewed by the Fifth Circuit, satisfies that standard. Forbidding the holistic manner in which UT-Austin considers race in admissions would not create a race-neutral playing field, but would create further setbacks to the goal of equal opportunity in education. For these reasons, Amici respectfully submit that the Court should affirm the decision of the Fifth Circuit.

Respectfully submitted,

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